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2007 NOV -9 A 11: 43

George Freeman  
Vice President and  
Assistant General Counsel

November 8, 2007

620 Eighth Avenue  
New York, NY 10018

fax 212.556-4634

**VIA OVERNIGHT MAIL**

Jeff S. Jordan, Esq.  
Supervisory Attorney  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

Re: **MUR#5939**  
***Complaint against MoveOn.org Political Action ("MoveOn") and The New York Times Company ("The Times")***

Dear Mr. Jordan:

Attached please find The New York Times Company's response to the complaint by The American Conservative Union regarding the price paid by MoveOn for publication of an advertisement in The New York Times.

I write here to respectfully request that at such time as the enclosed response ("The Times's response") is made public, certain sections of it be redacted from public view for the reasons set forth below.

The Times's response contains confidential, proprietary information critical to the business dealings of the Company. Thus, The Times's response details sensitive advertising information and strategies, the disclosure of which could severely prejudice The Times in its future dealings with advertisers. The disclosure of this sort of trade secret information would not only harm The Times vis-à-vis its publishing competitors, it would also give advertisers significant leverage over The Times with knowledge of how to negotiate against The Times in their future dealings with The Times. This would have a very detrimental effect on The Times's business and revenues.

For these reasons, we respectfully request that when The Times's response is made public, the following sections be redacted:

- on page 1, the 2nd and 3<sup>rd</sup> sentences of the second paragraph

- on page 2, the 1<sup>st</sup> and 2<sup>nd</sup> bullet point
- The first two sections of "Analysis", from the top of page 5 through the middle of page 8.

We also have taken the liberty in the enclosed submission of redacting names of The Times and MoveOn employees from Exhibit 1, the email string relevant to the transaction at issue. This is solely to protect those staff employees' privacy. On the Exhibit's first page, I have listed, by specific designations, the individuals involved in the email communications.

If you have any questions regarding this redaction request, please do not hesitate to call me at the above number. Thank you very much for your consideration.

Very truly yours,



George Freeman

GF/pd

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New York Times Company ("The Times")***

Dear Mr. Jordan:

We write in response to the complaint by The American Conservative Union dated and received by the Commission on September 14, 2007. The complaint alleges that The Times violated the Federal Election Campaign Act of 1971, as amended, (the "Act") by publishing an advertisement from MoveOn attacking Gen. Petraeus on September 10, 2007 (the "ad") at a price substantially less than the "open rate" for a full-page black/white advertisement. The complaint alleges that the "discount" thereby given by The Times to MoveOn constituted an illegal corporate contribution to a federal political committee.

**INTRODUCTION**

The Complaint is predicated on a fundamental misunderstanding of how newspaper advertising is priced and sold. Advertising pricing is a vastly more complex and market-driven process than the complaint portrays. Indeed, the overwhelming majority of newspaper advertising, in all categories, is priced beneath the so-called "open rate". The advertisement in question was purchased as a result of a routine advertising transaction, indistinguishable from a process that

occurs hundreds of times each day at The Times and other publications. The ad was priced by The Times's advertising department whose sole objective was to obtain the highest price it could.

Contrary to the allegations in the complaint, there was no participation in this process by the news or editorial departments or by anyone else with a non-economic interest in the matter. As the ad was market-priced, there was no contribution, soft money or otherwise, to MoveOn, and the Commission should therefore find no reason to believe that a violation of the Act occurred.

As is set forth in greater detail below, the complaint should be dismissed for the following reasons:

- This was a routine advertising sales transaction, as it clearly shown by the communications between the parties at the time. They involved discussions resulting in a customized rate for this particular ad and advertiser. The Times's goal, as is any advertising department's, is to maximize revenue, and to accomplish that often ads are sold at different rates and terms based on a wide variety of commercial factors.
- Indeed, there are scores of examples of other ad sales by The Times and other publishers to all sorts of advertisers at rates far below the "open rate". Especially in today's very competitive marketplace, advertising prices in the newspaper and magazine business often are the result of negotiations with advertisers.
- A review of the communications between the parties prior to publication of the ad demonstrates clearly that there was no political or ideological consideration by The Times whatsoever in determining the rate and terms for the ad and that the advertising salesperson who sold the ad did not see its content. Thus, the allegation that this transaction was influenced by The Times's purported ideological bent has simply no factual basis.

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- On September 25, 2007, MoveOn voluntarily paid The Times \$142, 083.14 for the ad. This amount is the highest applicable rate (net of agency commission) for such a full-page ad and was well in excess of the \$64, 575 which had been agreed upon by the parties prior to publication of the ad. In light of this payment, it would appear that to the extent there was even any technical violation, which The Times denies, the violation has been remedied, and this cure has made the matter moot.
- Finally, if the Commission chooses to further investigate this particular transaction, it would open the door to investigating almost every other print advertisement purchased by a candidate or registered political committee, as the vast majority are sold in the marketplace after a process just like this one. As if to prove that point, on October 5, 2007 we received a new and different complaint, filed with the Commission on September 26 (MUR 5942), challenging and contesting the rates and terms given by The Times for an ad published by the Rudy Giuliani Presidential Committee.

For all these reasons, it is respectfully submitted that no there is no reason to believe a violation has occurred in this matter.

### **THE LAW**

The Act and Commission regulations bar any contribution or expenditure in connection with a federal election. See 2 U.S.C. sec. 441b(a); 11 C.F.R. 114.2(b). For purposes of this prohibition, the term "contribution or expenditure" includes "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with" any federal election. 2 U.S.C. sec. 441b(b)(2). See also 11 C.F.R. sec. 114.1(a)(1). The term "anything of value" includes

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"in-kind contributions," i.e., goods or services provided at no charge or at less than the usual and normal charge for such goods and services. 11 C.F.R. sec. 100.52(d)(1); 11 C.F.R. sec. 100.111(e)(1). The difference between the amount actually charged and the usual and normal charge is the amount of the in-kind contribution. 11 C.F.R. sec. 100.52(d)(1); 11 C.F.R. sec. 100.111(e)(1).

In applying the foregoing usual and normal charge standard to particular transactions between political committees and the corporate providers of goods and services, the Commission has analyzed the transactions based on what are the usual and normal charges and terms of sale in the commercial marketplace. The Commission has recognized that there is often a range of commercially reasonable prices in particular markets, and that corporate vendors frequently use and weigh a number of commercial factors and criteria in arriving at a sales price.

Moreover, the Commission has applied the usual and normal charge standard "to a variety of situations where a corporation provides goods or services at a discount, or with a rebate, to a Federal candidate or political committee." Advisory Opinion 1996-2 (CompuServe) at 2. In so doing, the Commission "has permitted a number of proposed transactions on the basis that the discount or rebate is made available in the ordinary course of business, and on the same terms and conditions (e.g., business volume) to the company's other customers that are not political committees or organizations." Id. See also Advisory Opinion 1988-25 (General Motors) at 3 (emphasizing that the Commission has allowed corporations "to give volume discounts or rebates to candidates for Federal office who purchase the corporate vendors' services or goods if those discounts or rebates are offered in the ordinary course of the corporation's business to non-political customers or clients, and if offered on the same terms and conditions to the candidate or political committee").

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## **ANALYSIS**

### **The Ad was Purchased Routinely, with the Rate Determined by Market Factors**

To understand how routine this transaction was, it is instructive to understand how rates are determined in the publishing industry and at The Times. The published advertising rate cards are far more complicated than they would appear, including literally thousands of different prices depending on advertising category (advocacy or automobiles, retail or restaurants), frequency of ads, size of ad, color, placement in various sections of the paper, bundling with on-line advertising, and so on. And even these permutations do not address all the variations encountered in the dynamic advertising marketplace. The rate card's "open rate" - - which complainant uses as the set rate and from which it determines the "deduction" which MoveOn purportedly received - - is by far the most expensive rate available, and is one of the least used. The "open rate" is in practice more of a starting point for discussions between the publisher and advertiser; often the final price depends on what the market will bear.

In fact, the ultimate ad rate is often customized to the particular advertiser's needs and is based - - in addition to the factors noted above - - on a variety of market factors including the advertising history and loyalty of the advertiser; the amount of advertising purchased in the past, and, more important, the amount that The Times thinks will be purchased in the future; The Times's perception as to the advertiser's need to run an ad and its options to go to competitive media; The Times's perception of the advertiser's ability to pay; The Times's overall goal of revenue maximization; The Times's short run budgetary requirements and variations in seasonal volume; and even the skill and acumen of the representatives on both sides. As is true in the vast majority of advertising transactions, many of these factors contributed to the final rate in this case.

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Negotiations with MoveOn which ultimately led to the rate for the Petreaus ad began in August when a representative of MoveOn emailed The Times advertising salesperson in the advocacy category and sought "a good price" for a series of 4-5 ads for a total of around \$125,000. The Times countered at a full-page rate of \$40,000 per ad if they committed to run 3 pages and \$35,000 per ad if they ran five pages, assuming that MoveOn also bought on-line advertising on nytimes.com. Without the on-line component, The Times considered rates from \$3,000-\$5,000 higher per ad. Far from showing favoritism to MoveOn, and consistent with the commercial nature of the transaction, The Times's rate manager emailed the advertising salesperson: "I am afraid if we go out of the gate with extremely low rates, we'll never get them much higher, and as the political seasons is fast approaching – much earlier than in past elections, we should be one of their 'must buy' publications."

MoveOn did not commit to this frequency. However, about a month later, against this background, it sought to publish a full-page ad without committing to further purchases. On September 7 The Times's advertising salesperson asked colleagues on The Times price team for a rate for a full page black and white September ad. Knowing that MoveOn had been quoted rates of between \$35,000 and \$45,000 for three to five ads and would likely be unwilling to pay significantly more (and still hopeful of enticing MoveOn to commit to a greater volume of ads), the rate manager suggested that the single ad be priced at \$50,000. The advertising salesperson decided that The Times could get a higher price and offered MoveOn the \$64,575 price with the implicit understanding that the ad would run on September 10. This was the best result for The Times that the salesperson thought could be obtained without risking loss of the ad altogether. The email string showing all these discussions is attached as Exhibit 1 hereto.



Although that price was the same as the standby rate, a rate which an advertiser pays for an ad when it is not guaranteed placement on a certain date but rather within seven days of submission, this was not technically a standby ad, since it wasn't made clear to the advertiser that the ad might not run on the day which the advertiser desired. The fact that the rate offered by The Times was the same as the published standby rate was a discrepancy which caused some degree of confusion. However, since a Monday in September is a notoriously soft advertising period, whether the ad was classified as standby or not, it was pretty clear to the parties that the ad would run on that day, as the advertiser desired.

This narrative and the accompanying email demonstrate that far from being a "contribution" to MoveOn, the ad rate was determined by The Times's goal in profit maximization within the context of many of the factors ordinarily at play in these types of transactions. It was a commercially reasonable transaction, resulting in a normal and usual charge to the advertiser.

**Customization of an Ad Price is Normal and Usual in the Newspaper Advertising Marketplace**

The discussions and outcome set forth above are routine in today's challenging advertising marketplace where the print media is struggling against the Internet and other media. Rates and terms are often customized for advertisers and are the results of negotiations and marketplace factors. This occurs in scores of transactions every week. Allow us a few examples.

Some advertisers, ranging from a division of the U.S. Military to an international advocacy group, have purchased full-page advertising from The Times at or about the standby rate, even when their ads have been reserved for a specific date. In other cases advertisers wanting full page ads ranging from an advocacy ad about pets to an ad about a political controversy in a university to an ad regarding water and sanitation all received guaranteed placement dates despite paying less than the standby rate.

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Even advertisers running ads in The Times on a standby basis, i.e., not being sure within a week's time when the ad would run, often pay less than the published standby rate price. Thus, an ad involving a state commission on judicial conduct as well as an ad placed by a Catholic religious group were priced at less than the standard standby rate for a standby ad. Again, as in all these cases including the one at issue, a wide variety of commercial factors led to the determination of the rate. While these are just examples, the important point is that they are not exceptions; they are the way advertising transactions are completed throughout the newspaper and magazine industries.

**Ideology and Politics had Nothing To Do with the Rate and Terms of the MoveOn Ad**

After controversy surrounded the publication and payment terms of the ad, speculation was rampant that The Times gave MoveOn a "discount" because it was sympathetic to the content of the ad. A passage from Exhibit C to the complaint typifies the spin many delighted in: "Citing the shared liberal bent of the group and the Times, one Republican aide on Capitol Hill speculated that it was the 'family discount'". Indeed, it was this wholly unsupported and rank political opportunism which appears to have given birth to this complaint.

In fact, nothing could be further from the truth. The email traffic concerning this ad, both between the salesperson and MoveOn and among The Times's advertising rate group, convincingly shows that the ideology of MoveOn had nothing whatsoever to do with the price which was set. Neither the Times's young advertising salesperson - - nor anyone else at The Times - - had read the content of the ad when terms were negotiated with MoveOn. Moreover, it would be beyond comprehension to believe that a junior advertising department employee made - - or could make - - ideologically- based decisions on the part of the newspaper or the Company. There is simply is not one of iota of evidence to support the fiction that politics had anything to do with this transaction; to the contrary, as depicted above, the actual course of dealings shows that this was a very routine and

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normal commercial arrangement between an advertiser and The Times, no different from similar transactions for ads placed by all sorts of advertisers from church groups and colleges to charities and the military.

**Since MoveOn Paid the Published Rate, The Matter is Moot**

As was described above, The Times's advertising salesperson and MoveOn agreed on a \$64,575 rate for the ad. This also is one of The Times's published standby rates. In the MoveOn case the \$64,575 rate was agreed on with the implicit understanding that the ad would run on Monday, September 10. In any event, the ad spawned not only public discussion of its content, but also criticism of The Times for charging MoveOn approximately \$65,000 for the ad, when, as The New York Post reported (see exhibit C to the complaint), the applicable open rate was \$181,692.

In fact, the published rate for a full page ad guaranteed to run on a certain date in that advertising category was \$142,083.14. From the \$181,692 one must subtract 8% which is the standard full-page discount and then from the resulting number subtract the 15% agency commission to yield \$142,083.14. This is the exact amount which MoveOn wired to The Times on September 25. Thus, MoveOn, in the end, paid the published full-page guaranteed rate, not a standby rate and not the \$64,575 which had originally been agreed upon by the parties. In light of this, to the extent there ever was a technical violation here, which for the reasons set forth above we deny, it has been cured.

**Investigation Here would Lead Inevitably to the Commission Reviewing Almost Every Print Political Ad**

Since, as depicted, the commercial transaction in this case was no different from thousands of ad sales made by magazine and newspaper publishers such as The Times every day, if the Commission determines to further investigate this case on the basis that MoveOn paid less than the

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published open rate price, the Commission then would be in a position of having to investigate almost every ad purchased by a political candidate or registered political committee. To use its energies in such a way and to constantly be called upon to second-guess the rational business decisions of advertising departments seem neither in the interest of the Commission or the public.

Indeed, so as almost to make prophets of us, within a few weeks of the publicity accorded to this matter, a second complaint was made against The Times, by Lane Hudson of Washington D.C. Mr. Hudson's complaint is that an ad placed by the Rudy Giuliani Presidential Committee was, as the ad at issue here, placed at below the fixed rate and that the difference in what was paid and the published rate therefore was a prohibited in-kind corporate contribution. While we will answer that meritless complaint in due course, suffice it to say that the Giuliani matter appears as the political counterpoint to the current case. Thus, if The American Conservative Union complains to the Commission about the MoveOn ad, that will be followed by a liberal sympathizer complaining about a Rudy Giuliani ad, and so on. Certainly, the Commission would be ill-advised to go down such a road.

For all the reasons set forth above, it is respectfully submitted that the Commission should find no reason to believe that a violation has occurred and should dismiss this matter.

Respectfully submitted,

  
George Freeman

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